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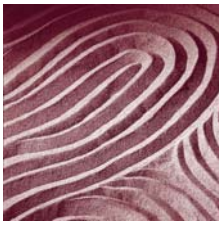

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Civil and Regulatory Liability Associated with Spills and Historic Site Contamination

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and
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CIVIL AND REGULATORY LIABILITY ASSOCIATED WITH SPILLS AND HISTORIC SITE CONTAMINATION

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I – INTRODUCTION

In many environmental contamination cases, the roots of the problem extend far back in time. Two main obligations come into question when a spill or contamination incident occurs or is detected. First, what type of reporting obligations arise, and second, what are the remediation obligations – on whom does the responsibility to remediate lie, and to what extent must the property to be restored to its original condition? These questions are complex at the best of times, but become even more complicated when the contamination event in question happened decades ago. Historic site contamination presents the added wrinkle of who should assume the obligations of reporting, remediation, and, assuming the source company is still in existence, when there may be reprieve from liability.

This paper will explore these issues in the context of both regulatory and common law liability, with a look at some recent cases that may shed light on the elements courts are looking to in assisting them resolve these complex issues. The case examinations also highlight what remains uncertain in the law.

II – REPORTING OBLIGATIONS

A preliminary discussion of reporting obligations sets the backdrop for potential differences between spills and historic contamination.

A) Statutory Duties to Report - Current Spills

i) Provincial

The *Environmental Protection Act* (EPA)[2] imposes three main reporting obligations on the polluter, whether or not the polluter is the owner or in control of the pollutant. The section

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[2] R.S.O. 1990, c. E.19

13 reporting obligation arises when a release of a contaminant exceeds specific concentrations prescribed by the regulations:

> Every person,
>
> (a) who discharges into the natural environment; or
>
> (b) who is the person responsible for a source of contaminant that discharges into the natural environment,
>
> any contaminant in an amount, concentration or level in excess of that prescribed by the regulations shall forthwith notify the Ministry of the discharge.

Section 15 of the EPA deals with more unusual types of contamination:

> Every person who discharges a contaminant or causes or permits the discharge of a contaminant into the natural environment shall forthwith notify the Ministry if the discharge is out of the normal course of events, the discharge causes or is likely to cause an adverse effect and the person is not otherwise required to notify the Ministry under section 92.

Section 92(1) falls under the Spills section of the Act and imposes broad reporting obligations:

> Every person having control of a pollutant that is spilled and every person who spills or causes or permits a spill of a pollutant shall forthwith notify the following persons of the spill, of the circumstances thereof, and of the action that the person has taken or intends to take with respect thereto,
>
> (a) the Ministry;
>
> (b) any municipality …;
>
> (c) where the person is not the owner of the pollutant…, the owners of the pollutant; and
>
> (d) where the person is not the person having control of the pollutant …, the person having control of the pollutant.

This spill reporting obligation is further qualified under the EPA:

> The duty imposed by subsection (1) comes into force in respect of each of the persons having control of the pollutant and the person who spills or causes or permits the spill of the pollutant immediately when the person knows or ought to know that the pollutant is spilled.[3]
>
> The person required by subsection (1) to give notice and the owner of the pollutant shall give to the Director such additional information in respect of the pollutant, the source of the pollutant and the spill of the pollutant as may be required by the Director.[4] …

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[3] *Ibid*. s. 92(2).

[4] *Ibid*. s. 92(3).

> The owner of a pollutant and the person having control of a pollutant that is spilled and that causes or is likely to cause an adverse effect shall forthwith do everything practicable to prevent, eliminate and ameliorate the adverse effect and to restore the natural environment.[5] (emphasis added)

The *Ontario Water Resources Act* (OWRA)[6] outlines reporting obligations for the polluter that are specific to the discharge of any substance into waters. "Waters" are defined in the Act as "a well, lake, river, pond, spring, stream, reservoir, artificial watercourse, intermittent watercourse, ground water or other water or watercourse".[7]

Section 30(2) provides that:

> Every person that discharges or causes or permits the discharge of any material of any kind, and such discharge is not in the normal course of events, or from whose control material of any kind escapes into or in any waters or on any shore or bank thereof or into or in any place that may impair the quality of the water of any waters, shall forthwith notify the Minister of the discharge or escape, as the case may be.

ii) Federal

Where provincial legislation applies to private landowners, federal environmental protection legislation is broader. The *Canadian Environmental Protection Act, 1999* (CEPA)[8] deals with the regulation of toxic substances, nutrients, ocean dumping, international air and water pollution, waste management, biotechnology, and the environmental management of federal government activity. Section 95 of the Act imposes a broad reporting requirement on polluters, requiring notification both if a release of toxic substance actually occurs, and if there is any *likelihood* of release:

> Where there occurs or is a likelihood of a release into the environment of a substance specified on the List of Toxic Substances in contravention of a regulation or an order, any person who,

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[5] *Ibid*. s. 93(1).

[6] R.S.O. 1990, c. O.40

[7] *Ibid*., s. 1(1).

[8] S.C. 1999, c. 33

> (a) owns or has the charge, management or control of a substance immediately before its release or its likely release into the environment, or
>
> (b) causes or contributes to the release or increases the likelihood of the release,
>
> shall, as soon as possible in the circumstances, notify an enforcement officer and provide a written report on the matter to the enforcement officer and make a reasonable effort to notify any member of the public who may be adversely affected by the release or likely release.

CEPA, 1999 also has parallel provisions pertaining to releases to air in contravention of a regulation,[9] and releases to water in contravention of a regulation.[10]

The implications of these provincial and federal obligations are to set up a regime in which a polluter or person in control of a pollutant must report any spill or discharge of noxious substances into the environment when it occurs. In contrast, they impose no additional obligations on third parties who detect such contamination events.

B) Historic Contamination – Reporting Duties: Are there any?

It is unlikely that there is any statutory duty to report historic contamination to the Ministry of the Environment (MOE), unless a current adverse impact exists – for instance, current impact to groundwater, a surface water body or drinking water source. Prior to the enactment of the relevant legislation, there was no legislated obligation to report a spill, and historical contamination is likely not properly classified as a spill under any current legislation. As is clear from the language of the reporting obligations set out in the statutes above, the duty applies only to current or new contamination events. Nonetheless, an argument may be made that current contamination reporting obligations arise in cases of ongoing migration from historical contaminant sources and particularly in cases of impacts to surface water bodies.

In practice, however, the MOE's awareness of historic contamination tends to arise instead upon the sale or change of use of property, whether the property that was the initial source of contamination or that has become contaminated (over time) through historical migration. It may also be coupled with litigation between the property owners (past and present) and neighbouring lands. From a practical perspective, the involvement of the MOE in historical

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[9] *Ibid*. s. 169

[10] *Ibid*. s. 179

contamination cases adds (or may add) a further regulatory layer to remedial activity which may be beneficial. In certain cases, it facilitates an increased tempo or motivation for parties to effect remediation and resolve litigation in order to comply with or avoid regulatory clean-up orders. Noteably, the MOE may also become involved not as a regulator, but as a witness to past regulatory practices on historically contaminated lands. The MOE will certainly take an interest where groundwater or surface water bodies may have been impacted, and may take action resulting in Orders against multiple parties, depending upon the nature or source of the contamination.

III – REMEDIATION OBLIGATIONS

A. Regulatory Imposition of Remediation

Various provisions of the Environmental Protection Act may provide some statutory basis for remediation. The EPA's Section 93 duty to act forthwith only applies to spills (defined as "a discharge into the natural environment from or out of a structure, vehicle or container"). The duty arises when the person with the duty knows or ought to know that the pollutant is spilled and is causing or likely to cause an adverse effect. Section 93 is therefore unlikely to be applicable in cases of historic contamination.

Remedial obligations may be imposed in cases where Records of Site Condition (RSC) requirements arise, but historically contaminated sites may not be subject to these legislated duties where redevelopment is not economically feasible. The RSC regulations are beyond the scope of discussion herein but are noted for completeness.

The EPA various order provisions can impose preventive or remedial obligations, although their issuance may be severely restricted. A Remedial Order under section 17 may only be issued to a person who caused or permitted the discharge. A Control Order under section 7 must be based on a finding that a contaminant is being discharged. A Provincial Officer's Order under section 157 must be premised on non-compliance with the Act itself, with an order under the EPA, or under a term or condition of a certificate of approval. The most useful and broad tool is the Preventive Measures Order under section 18 to implement remediation measures – monitoring, reporting, installing, developing, reducing, remediating contamination or the risk of it. Different EPA Orders may be issued to current and former owners, current and former occupants, and persons who have or had management and control of the property. Potential

jurisdiction issues exist with Orders against former owners or occupants when the contamination pre-dates the statutory authority for the Order. This may not be determinative, however, considering the "polluter pays" principle[11] now endorsed by the Supreme Court of Canada in *Imperial Oil Ltd. v. Quebec (Minister of the Environment).*[12]

Historically, the Ministry of the Environment has only taken action to require remediation when the contamination has migrated off-site, although this is a practical approach to administering the EPA and there is no basis in law for such a distinction. In determining whether to exercise its jurisdiction, the Ministry of the Environment has not traditionally differentiated between soil and groundwater contamination, but since Walkerton, this pattern may have changed. Now, on-site groundwater contamination is more likely to be treated in the same manner as off-site contamination, with the Ministry intervening to require remediation. The introduction of the RSC also provides both the Ministry and the public with a current snapshot of the environmental condition of a contaminated site, but leaves a window of opportunity open to prosecuting future contamination on the same site.

Land purchase agreements may explicitly or implicitly transfer liabilities associated with contamination to a new owner. While the Ministry of the Environment may try to work within the agreement, it has no requirement to do so and, if an Order is issued, it will usually include all potentially responsible people. Nonetheless, transfer of liability in exchange for consideration may be a useful appeal tool before the Environmental Review Tribunal (ERT) to attempt bring in responsible parties where Orders did not name them. Even if unsuccessful for purposes of an appeal, it invites the potential for early involvement of those who assumed liability under agreement rather than drawn out litigation.

B) Civil Liability Imposition of Remediation

Whether or not the MOE is involved from a regulatory perspective, historic site contamination cases and civil remedial obligations may be considered from two perspectives – those where contractual provisions play a starring role and those where environmental causes of

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[11] Which emphasizes the responsibility of those who engage in environmentally harmful conduct, either as producers or consumers, for the costs associated with their activity, rather than placing responsibility on the government to clean up contaminated sites.

[12] [2003] 2 S.C.R. 624, 2003 S.C.C. 58.

action are interpreted on the specific facts of each case. The remedial obligations in each are quite different, and there remains significant uncertainty surrounding the appropriate measure of damages in cases where liability is found.

i) Beware the Contract – what has been negotiated?

A preliminary examination of relevant contracts in historic contamination cases is critical in determining whether liability will arise. Prior to closing a real estate transaction, it is important for a purchaser to perform all appropriate background research to determine whether there is any chance that contamination may be at issue in the future. While due diligence issues are beyond the scope of this paper, a review of several cases involving historical site contamination claims provides a useful warning to begin our discussion of common law causes of action involving historical contamination. Due diligence in purchasing includes ascertaining the history of the property's ownership, which could have avoided problems in *66295 Manitoba Ltd. v. Imperial Oil Ltd.*[13] In that case, the numbered company purchased commercial land in 1984. Unbeknownst to the purchaser, Imperial Oil had owned the land between 1951 and 1977 and operated a gas station on the property. In 1999, petroleum chemicals were discovered in the soil. The chemical impact apparently presented no health risk, but when the numbered company attempted to sell the property it found that the impacted soil created a stigma. The numbered company claimed against Imperial Oil for pure economic loss.

The court dismissed the application based on the fact that the claim did not fall under any category of pure economic loss, and the court refused to create a new category to fit this situation for policy reasons (ie. indeterminate liability for oil companies). It went on to suggest that the numbered company should have done the appropriate investigations before purchasing the property to avoid the situation.

In a similar Ontario case involving Petro-Canada – *862590 Ontario Ltd. v. Petro-Canada Inc.*[14] – the numbered company purchased property from Petro-Canada that had been used as a fuel depot and bulk sales plant. As part of its due diligence, the numbered company received a

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[13] [2002] M.J. No. 12451 (QB)

[14] [2000] O.J. No. 984 (Sup. Ct.)

report prepared for Petro-Canada and a letter from the Ministry of the Environment concluding that there were no environmental concerns with the property. Interestingly, the report did not address the extent of hydrocarbon contamination. In the agreement of purchase and sale, Petro-Canada made no warranties with respect to the property, and the numbered company agreed to indemnify Petro-Canada for any property contamination claims. Prior to closing, a report prepared by a different company came to light, indicating that there was, in fact, contamination. The Ministry of the Environment therefore required an environmental cleanup of the site, and Petro-Canada arranged for another site cleanup, which was completed and the transaction closed. The plaintiff did not obtain a reliance letter from the remediation consultant, incorporate the report into its transaction documents, or require any amendments to its agreement reflecting the new information and subsequent clean-up.

Several years later, the numbered company attempted to sell the property but was unsuccessful due to environmental studies obtained by potential purchasers showing contamination. The numbered company claimed against Petro-Canada in fraud and negligent misrepresentation. The court dismissed the action, holding that the numbered company did not prove that it suffered damages based on fraud or negligent misrepresentation. The property value had actually doubled since the numbered company originally purchased the property (excluding contamination). The court went on to say that if the numbered company had wished to rely on the report from the second cleanup, it should have specifically referred to it in the agreement of purchase and sale. Any reliance on implied negligent misrepresentation was barred by exclusions in the agreement of purchase and sale.

Examination of contract provisions is equally important in relation to the scope or standards of remediation imposed. In *Michael Johnston v. Shell Canada,*[15] the parties came to agreement on the scope of, and procedures for, remediation, including the retainer of a consultant who had complete discretion as to the testing and remediation required, and the particular MOE standards that were applicable (Table B versus Table A). Johnson felt additional testing was required despite the consultant's view that it was not. He argued that an interpretation of the

[15] [2006] O.J. No. 3516 (CA).

agreement that would allow Shell, as the polluter, to walk away from the Property without conducting the appropriate testing and remediation would be absurd.[16]

The court held that

> …the Minutes of Settlement delegate to Golder the authority to determine the appropriate further testing to be conducted on the Property and consequently, whether further remediation is necessary. Absent demonstration of palpable and overriding error, the motion judge's conclusion that Shell met its obligations under the Minutes of Settlement is entitled to deference in this court.[17]

Aside from the level of remediation that may be negotiated, courts will also enforce remedial agreements involving the term for remedial obligations to occur. In *Lionhead v. Petro-Canada*,[18] the Plaintiff purchased a contaminated site from a third party based on the Defendant's promise to remediate the property and indemnify the Plaintiff for all losses incurred or suffered due to the contamination. No completion date was specified or promised for the property. Petro-Canada granted an indemnity in favour of the purchaser for all losses incurred. Ten years later, with long term remediation still underway, the Plaintiff sold the property for $3 million. It sued Petro-Canada claiming that had the property been remediated, it would have sold for an additional $1 million. The Court dismissed the Purchaser's claim for $1 million in "lost profits", holding that the language of the agreement between the parties was clear and unambiguous. No clean-up date was specified or promised for the property, and the indemnity clause covered restoration for losses or expenses that had actually been suffered. In selling the property, Lionhead did not suffer any loss as contemplated by the agreement, as the sale earned an almost $2 million profit.

Old Colony Properties Inc. v. Ontario,[19] also discussed the appropriate standard of remediation in the context of the negotiated agreement between the parties. Old Colony Properties Inc. was the landlord of a property occupied by the Crown. Old Colony agreed to clean up historical asbestos contamination that had been initially caused by the Crown, provided

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[16] *Ibid*. at para. 26

[17] *Ibid*. at para 35

[18] [2006] O.J. No. 2402 (Sup. Ct.)

[19] [2004] O.J. No. 1573 (CA)

that they continued to pay rent in the building. Once the clean-up had been completed, the Crown refused to pay rent, claiming that Old Colony's clean-up had been insufficient in that a more stringent clean-up was required.

The court in this case held that as follows:

> Old Colony's commitment to clean the building must be interpreted in a commercially reasonable fashion. In our view, such an interpretation excludes, as unrealistic, the notion that Old Colony would bring the building into the "pristine/hospital-like" condition imposed by the Union. Rather it suggests a cleaning sufficient to bring the building within the lesser standards required by the Ministry of Labour. [20]

The Trial Judge found that since the extensive re-cleaning needed to bring the building into pristine condition was attributable to the Crown by virtue of its failure to comply with the terms of the lease, as well as its own policy guidelines, the Crown should bear the costs of re-cleaning. The Trial Judge's decision was upheld on appeal, and the Crown was found liable to the Landlord for $131,000 spent by Old Colony in the final clean-up of the building to "pristine", as well as $273,053 in rent unjustifiably withheld.

The Saskatchewan case of *Busse Farms Ltd. v. Federal Business Development Bank*[21] examined the issue of waiver in sale agreements and who may be an improper party to sue. Busse was the purchaser of land from the Bank that had been previously used as a gas station, with a caveat in the agreement of purchase and sale that the bank provided no express or implied guarantee regarding the fitness or use of the land or equipment. A subsequent environmental audit revealed that the subsoil of the property was contaminated by gasoline, caused by a leaking coupler in a gas delivery line. Several gas station operators had occupied the property prior to Busse taking possession, although the bank had financed the initial property development.

Busse unsuccessfully sued the bank in nuisance for the discharge of a pollutant. On appeal, the Bank was held not to be the owner or successor of the owner of the pollutant, and not to have management or control of the pollutant. The original developer of the property had management or control of pollutant immediately prior to initial discharge of pollutant and would have been the appropriate party to claim against. The provision in Busse's agreement of

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[20] *Ibid*. at para. 5

[21] [1998] S.J. No. 786 (CA)

purchase and sale constituted a waiver of Busse's right to claim for damages for losses arising from the discharge.

The salient feature of these cases lies in the courts' unwillingness to loosen or waive contractual agreements despite a sometimes unpalatable result for the party that did not cause or contribute to the contamination. Examination of existing or historical contract documents is one of the key steps in claiming and defending historical contamination claims.

ii) Civil Causes of Action

Claims for environmental contamination damages tend to encompass negligence, nuisance, trespass and strict liability (*Rylands v. Fletcher*) type claims. Because historical claims may, and usually do, involve multiple parties, all of these causes of action may be applicable. Additional causes of action may also be available in cases of tenancies – including the reversionary claim of waste. Key elements for consideration include the following:

- the nature of the parties involved - land owners, insurers, brokers American parent corporations, directors and officers, and tenants – from the consideration of both current and historical time periods.

- the nature of the site involved - the investigative history surrounding the site or sites in question, the nature of contamination, whether prior remedial work was carried out, the nature of on-site operations, the existence or lack of historical insurance policies covering or excluding environmental claims, the differences or similarities between contaminants used in historical operations and those found in recent soil or groundwater analyses, favourable or unfavourable hydrogeologic and hydrologic evidence (groundwater flow, etc.)

A look at some recent cases on these types of claims considers these issues.[22] A particularly noteworthy case from the perspective of evidence of groundwater flow is *Belt Line Investments Ltd. v. Beaver Fuels Management Ltd.* [2002] O.J. No. 4389 (Sup. Ct.). Petroleum

[22] This is not an exhaustive review of these causes of action and only select cases have been referenced.

hydrocarbon contamination was discovered on the Belt Line property in 1995. There was some evidence that Fairbanks Lumber, a company that had operated on the property for decades, had stored gasoline, kerosene, diesel, and furnace oil on the property, and had allowed delivery trucks to park on the property. However, a neighbouring Shell station located to the south of the Belt Line property had done a major cleanup of their site in 1991, having reported a loss of 14,000 litres of gasoline in 1986.

Belt Line sued Shell in nuisance, with the main issue in the case being whether Shell's 1986 spill could have caused the contamination to the Belt Line property. One expert report concluded that the only way gasoline hydrocarbons could have spread from the Shell service station property to the Belt Line property was via groundwater, which flowed to the east. The other expert report stated that the groundwater flowed to the north. The first expert questioned the second expert's findings, and the readings on the contaminated Belt Line property also demonstrated a pattern counter to a plume running from south to north. The Court dismissed Belt Line's action based on the reliability of first expert's evidence, holding that Shell was not the source of the gasoline contamination at the Belt Line property.

In *R & G Realty Management Inc. v. Toronto (City)*,[23] R&G purchased lands adjacent to a waste site operated by the City of Toronto. The City had entered into an agreement with the previous owners of the property to use a portion of their property for landfill purposes. When R&G sought a permit to build on their property, it was refused based on possible soil contamination to the property. Subsequent environmental assessments revealed contamination to R&G's property as a result of waste disposal on the property, as well as methane gas contamination migrating from the former landfill site next door.

R&G sued the City under all four potential causes of action: negligence, nuisance, trespass and strict liability. The Court held that the City's duty of care incorporated two major elements: the first was a duty of care owed to persons on the Waste Site, arising from the City's creation of the potentially hazardous condition in the first place. This duty extended to ensuring that the Waste Site did not develop into a health and safety hazard and that air quality was not adversely affected, as well as ensuring that conditions at the Waste Site did not similarly affect

[23] [2005] O.J. No. 6093 (Sup. Ct.); additional reasons [2006] O.J. No. 193

persons on the R&G property. The second was a duty on the part of a landowner to prevent any circumstances that would create a nuisance, trespass, or strict liability with respect to adjoining properties (i.e. migration).

The City's obligations were somewhat restricted though, as they were held **not** to extend to notifying prospective purchasers of the R&G property that the properties had been used as a landfill site, and that there was therefore a possibility of soil contamination and methane gas migration. The Court held that the scope of a duty to warn potential purchasers would be much too broad, exposing the City to disclosure obligations of "unimaginable breadth and risk." As a third party to any purchase transaction, the City would receive no benefit from the transaction, and prospective purchasers have many opportunities to protect themselves in such a transaction. Finally, the City would have no way of addressing the liability issues associated with such a duty, particularly since it would be impossible to know in advance what information would be material to a potential purchaser. In the same vein, the court also held that the City's duty of care did not extend to remediation of a third party's property. The court refused to include both additional remediation costs beyond the reasonable cost of installing a gas control system and any diminution in value of the R&G property in what constituted reasonably foreseeable damages, especially given that a stigma claim was highly speculative.

The court divided its discussion of whether there was unreasonable interference with the use and enjoyment of the R&G property into two parts. For interference to be unreasonable, it had to either have health and safety or air quality implications on the site, or affect the value of the property. The court found that there was no evidence to support R&G's nuisance claim that the presence of methane gas constituted a health and safety hazard for individuals on the R&G property. Risks in the 1960s and 1980 were held not to constitute evidence of a current or future hazard and there was no evidence of a failure to satisfy the appropriate ambient air quality criteria.

The court further held that R&G did not demonstrate sufficient harm to prove damage or loss to sustain its claim in strict liability and trespass. The court referred to the rule in *Rylands v. Fletcher*, which states that a landowner is strictly liable for all of the damage that is the "natural consequence" of the escape of anything kept on the land that is likely to do mischief or cause peril if it escapes. The court cited *Tridan, infra,* as authority for the fact that the landowner is

liable for all damage caused by the escape of a dangerous substance, even in the absence of fault, clarifying this statement by saying:

> … the plaintiff is not required to demonstrate that the escaping substance is dangerous per se, only that, in escaping or migrating to an adjoining property, it causes damage to the property. It is, however, necessary that the confining of the substance to the defendant's property entailed a "non-natural" use of that property, in the sense that the substance was "not naturally there".[24]

Historic contamination cases may also involve ongoing migration issues, supporting claims for continuing nuisance arising from the contamination event. The 1991 decision of the Ontario Court of Appeal in *CNR v. Ontario (Northern Wood Preservers)*[25] holds that a discharge occurred only when a contaminant first entered the natural environment and not when it continued to move thereafter for purposes of interpreting section 14 of the EPA.

A recent B.C. case, *ML Plaza Holdings Ltd. v. Imperial Oil Ltd.*,[26] reveals that limitation periods may create a major stumbling block in continuing tort claims. ML Plaza owned a mall in which Imperial Oil ran a gas station pursuant to a 10-year lease with the mall. The lease provided that Imperial Oil was to indemnify ML Plaza for any damage to premises occurring from the operation of the gas station. In 1992, Imperial Oil ceased operation on the site, determined that the site was contaminated, and a year later, discovered that the contamination had migrated off site. Imperial Oil subsequently signed a 5 year lease with ML Plaza in order to remediate the property, but at the end of the 5 year term the property had not been remediated to ML's expected standard.

ML sued Imperial Oil in nuisance for the damage caused by negligent contamination of the land, claiming the cost of remediation and loss of past and future rental income. The Court held that the no new or additional damages were suffered by the plaintiff once the defendant decommissioned it tanks. The mere presence of contaminants was not sufficient to found a continuing nuisance claim, in the absence of additional damage sustained within the limitation period. No new damage was established by the plaintiff in the two-year period prior to the commencement of the claim.

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[24] *Ibid*. at para 39.

[25] [1991] 3 O.R. (3d) 609, aff'd (1992), 7 O.R. (3d) 97 (C.A.)

[26] [2006] B.C.J. No. 479 (SC)

iii) Damages

The Ontario Court of Appeal decision in *Tridan Developments Limited v. Shell Canada Products Ltd.*[27] is perhaps the most highly cited recent case involving assessing damages in cases involving land contaminated by the activities of a neighbour, in this case a spill.

Tridan was the owner of a car dealership in Ottawa whose land had been contaminated following a gasoline spill at the neighbouring Shell site. The issue at trial was the applicable level of remediation – whether to MOE guidelines or whether to "pristine" condition. Shell did not think Tridan should receive any damages since the contamination was at some depth and was not interfering with Tridan's use of the property in any significant way. Tridan and the trial judge disagreed. The trial judge found that cleanup to the MOE guidelines was not sufficient. Shell was ordered to pay for the cost of remediating the land to a "pristine state". In addition, the trial judge found that even after cleanup to pristine, there would still be a residual diminution in value of the land and awarded additional damages for stigma.

On appeal, three key conclusions were reached on the assessment of damages. First, the Court affirmed the trial judge's view that cleanup to guidelines in this case was not sufficient and that Tridan was entitled to damages equal to the cost of cleanup to a pristine state. Second, the Court found that the trial judge was wrong in ordering damages for stigma in addition to the cost of cleanup to pristine levels. The court found that the evidence did not support such a finding and that there would be no stigma attached to the land once it was cleaned to a pristine level. Third, and potentially of most significance, the Court made it clear that the choice between compensation for cleanup beyond guidelines and stigma damages was based on the trial evidence and as such, future cases raising these issues would all have to be determined on a case-by-case basis. The key passages of the decision are as follows:

> The trial judge might have relied upon those expert witnesses supporting the MOE guidelines as a reasonable measure of reparation and thus the damages suffered. This is a commercial property on a busy thoroughfare and unlikely to ever be a site for residential use. It might be concluded that in a practical sense Tridan is not likely to need or want to clean its soil at depth of every particle of pollutant. However, in the circumstances of this case I cannot say the trial judge erred in deciding that Tridan was entitled to reparation to a pristine state. [28]

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[27] [2002] O.J. No. 1 (CA).

[28] *Ibid*. at para. 12

This passage leaves open the suggestion that, in some cases, a trial judge could conclude that cleanup to current regulatory standards would be sufficient and no damages beyond the cost to clean up to guidelines would be awarded, whether that be the cost of cleanup to pristine or a measure of stigma. It remains open to trial judges to accept expert evidence that cleanup to guidelines alone is a reasonable measure of damages, especially in cases of commercial properties where a future change to residential use is unlikely. Unfortunately, the Court did not elaborate further and, as such, the implications of this passage will have to wait further judicial interpretation. The case has received prolific legal analysis and the commentary here is meant only to illustrate that this issue is far from judicial certainty.

Where plaintiffs and defendants disagree on whether damages should be the cost of cleanup to pristine levels or the cost of cleanup to guidelines plus stigma, what will a court determine? On the evidence of this case, the Court of Appeal tells us it cannot be both, but can the following passage be relied upon to support the position that the cheaper of the two options should always be chosen?

> In sum, the evidence compels me to conclude that there is no stigma loss at the pristine cleanup level. This conclusion also makes sense of the trial judge's holding that cleanup to the pristine standard was justified in this case. If the trial judge's assessment of stigma damage at $350,000 is taken as the diminution in value at cleanup to the guideline standard, then the more economical route is to proceed to the pristine level at an additional cleanup cost of $250,000 with no stigma damage.[29]

Should the more economical route always be the correct choice? Will there ever be persuasive evidence that a stigma will still exist even after clean up to a pristine level? While the Court of Appeal has given litigants some guidance, fundamental questions on how to assess damages for contaminated land remain unanswered. It is unclear whether subsequent owners of the same site would be eligible for the same measure of damages.

A recent Alberta case with similar facts to *Tridan* discusses the appropriate measure of damages for historic contamination. In *618369 Alberta Ltd. v. Canadian Turbo (1993) Inc.*[30], the numbered company plaintiff owned the land and building next door to a Canadian Turbo gas station, which had suffered historical leakage from gas tanks that had subsequently contaminated

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[29] *Ibid*. at para. 17

[30] [2004] A.J. No. 480 (QB)

the plaintiff's land. Shell purchased the gas station, acknowledged responsibility for the contamination, and entered into a remediation agreement with the plaintiff. The plaintiff was unable to obtain financing for its business due to the contamination and eventually decided to sell the property. The first potential buyer of the land could not obtain financing due to contamination, and several other offers were not accepted due to time constraints. A final offer on the property was also rejected by the plaintiff, although appraisal results determined that the offers had been in line with what market value for the property would have been had it not been contaminated.

The plaintiff brought an action in nuisance, trespass and negligence, arguing that it should be placed in the financial position it would have been in if the land had not been contaminated in the first place. The court awarded damages for the diminished value of property based on stigma, and for loss of profit as a result of the business's inability to move. However, the plaintiff was held to have a duty to mitigate its damages and the court found that it should have accepted the final offer to purchase. The court held that the plaintiff was entitled to the difference between the best offer received for the land ($310,000) and the final offer received ($290,000), as damages for the decrease in value of the land.

Mitigation was also an issue in *Eastgate Developments Ltd. v. First Pioneer Investments Ltd.*[31] in the context of the conduct of the remediation. Eastgate, the landowner, leased property to Pioneer over 10 years to operate a gas station. When the lease term ended, a dispute arose over whether Pioneer was responsible for removing the underground fuel storage tanks and pipes it had installed. Eastgate then discovered soil and groundwater contamination. The court considered the efficiency of the remediation program in making its decision. The Court held that a remediation conducted in 3 stages unnecessarily increased the costs, and Eastgate was ultimately only awarded a portion of its claim. The court also imposed a requirement of taking action to remediate within a reasonable time in order to mitigate damages, rejecting Eastgate's claim for damages for lost revenues on the basis that it was aware of contamination in 1998 and took no steps to remediate until 2002.

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[31] [2005] O.J. No. 3109 (Sup. Ct.)

The above cases tell a provocative story – that little certainty exists in this area of the law, and each case will be considered on its own facts. It also suggests that many cases are being determined outside traditional court battles.

IV – PRACTICAL CONSIDERATIONS LITIGATING HISTORIC CLAIMS

Litigants in historic contamination cases face several practical challenges. While this list is not exhaustive, consider the following from the perspective of both Plaintiffs or Defendants.

(a) The Scope of Defendants:

Often, land has changed hands more than a few times. In cases where the source property may not be clearly known, or where contamination may have migrated from more than one property, plaintiff's counsel faces a challenge of determining the proper scope of defendants. Does it include all existing and pre-existing landowners? Does it focus on current landowners only? What if current landowners were unaware of the historical contamination, or were aware, but not involved in causing or contributing to the plaintiff's contamination? The logistics of a broadly scoped claim may prove unworkable, and may lead to motions to strike where directors and officers or parent companies are improperly joined. The alternative may be equally unpalatable – that is, picking and choosing a select few, in the hope that multiple third or fourth party claims will be issued.

(b) The nature of the claim:

Typical claims include nuisance, negligence, trespass and strict liability collectively pleaded. In some cases, pleadings are quite specific (negligent misrepresentation). But one must consider whether the measure of damages under all causes of action are the same, and whether certain elements of a cause of action (continuing torts) require specific evidence that may contrast with other elements of the claim. As noted above, a complete historical picture, both above and below ground, must be developed to determine whether the elements are favourable to finding liability.

(c) Limitation Periods in relation to historical claims:

Determine when the cause of action arose and what the relevant limitation period should be. Too often, counsel plead intricate claims only to be faced with limitation period arguments. Again, in cases of continuing torts, consider what contamination has occurred in the prior limitation time period leading up to the issuance of the claim.

(d) Statutory causes of action:

If claiming damages for historical contamination, consider whether statutory causes of action exist for particular defendants – for instance, statutory rights under s. 99 of the EPA confer rights only against the owner of the pollutant and the person having control of a pollutant. Consider whether a neighbouring landowner on land that acted as a contaminant migration pathway/flow-through would qualify.

(e) Is involvement of the MOE warranted or advisable:

MOE involvement is sometimes beneficial but should be strategically considered in cases where reporting obligations do not exist. Consider whether orders will be issued and against whom. Relic polluter corporations from the 1920s-30s may be hard to come by!

(f) Litigation Timeline:

Historic contamination cases can take many years to litigate, with significant fees, numerous discoveries, numerous experts and changing settlement or trial strategies. If on the plaintiff side, think about what other processes may be available. Consider litigation as only one option, requiring significant longevity.

(g) The progress of remedial work:

Has remedial work been undertaken? Consider what standard of clean up is required versus what may be realistic. Consider who should bear the cost of such remediation and the time to effect it. Is a mandatory injunction to prevent further migration a realistic option? What adverse impacts may or may not exist. Is groundwater involved, and if so, whose groundwater is it? Should counsel become involved in remedial work as it progresses, and to what extent? Could this lead to potential witness issues and motions

seeking to remove counsel? Would or could a court become involved in remedial progress or should the MOE be involved. Can reliance on the MOE cause liability issues for some parties (including the MOE)? What is the nature of insurance retained by the professionals involved and what exclusions do they contain.

V – CONCLUSION

A number of common threads run through the treatment of spills and historic contamination cases in recent years. Contractual rights and obligations may determine liabilities. Remaining civil causes of action may well be available in traditional negligence, nuisance, trespass and strict liability but may be fraught with complications on the practical challenges involved, limitations and the appropriate measure of damages. Where the MOE is involved, either through mandatory or voluntary inclusion, an added layer of complexity may arise. With the rising cost of litigation and remediation, the costs may be too high on each side to let the courts decide. While some new court challenges will no doubt attempt to clarify these uncertainties, practically, remediation of historical contaminated lands will likely be driven more by new market opportunities than litigation. Recent large scale redevelopments of historically contaminated sites have not been funded through litigation spoils. In cases where litigation is a viable option, proceed with caution!